

In the Supreme Court of the United States
OCTOBER TERM, 1963

No. 386

FEDERAL POWER COMMISSION, PETITIONER

v.

TEXACO INC. AND PAN AMERICAN PETROLEUM
CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER
COMMISSION IN OPPOSITION TO
"MOTION OF TEXACO INC. FOR ORDER PERFECTING
PROPER VENUE ON REMAND"

The Federal Power Commission files this answer to Texaco's "motion" of May 11, 1964, so that it will be available for consideration in the event that the "motion" is not treated as constituting in substance a petition for rehearing.

To remand, or direct transfer of, this proceeding to the Court of Appeals for the Third Circuit, as Texaco requests, would involve a reversal of this

Court's decision that the court below erred in not dismissing the petition for want of venue (slip op., pp. 5-6). The usual mandate requiring the court below to proceed in accordance with this Court's decision would require the court of appeals to dismiss Texaco's petition. While such a dismissal would not in itself bar review by a court having jurisdiction and venue, the filing of a petition for such review is now barred by the expiration (as of January 29, 1963) of the statutory 60-day period within which such petitions must be filed (15 U.S.C. § 717r(b)).¹ We submit that the request that the Court reconsider and reverse the decision already rendered should be denied because it presents a new and separate claim (1) not heretofore briefed or argued, (2) not presently warranting consideration by this Court and (3) plainly without merit.

1. Texaco's present argument—that a petition for review under the Natural Gas Act, addressed to a court which lacks venue, may be transferred to a court where venue would exist—was not raised pre-

¹ The 60-day limitation is jurisdictional. *Michigan Consolidated Gas Co. v. Federal Power Commission*, 167 F. 2d 264 (C.A.D.C.); *Columbia Oil & Gasoline Corp. v. Securities & Exchange Commission*, 134 F. 2d 265, 267 (C.A. 3).

It may be noted that, when the Federal Power Commission filed its motion to dismiss, Texaco had 46 days remaining, of the 60 days allowed by the statute, in which it could have filed a protective petition in one of the courts of appeals to which it had previously taken orders of the Commission for review, or the Third Circuit. However, the 60-day period had expired by the time the court below heard oral argument on the motion. The statutory bar has therefore not been affected by the bringing of the case before this Court.

viously in this litigation, although the Commission has consistently requested dismissal of Texaco's petition for review, both in the court below (R. 72) and here. In our petition seeking certiorari, we specifically stated (Pet. p. 2, n. 1), "the Commission also reserves the right to argue that the court below erred in not dismissing Texaco's petition for review for lack of proper venue under Section 19(b) of the Natural Gas Act." And in the conclusion to our brief on the merits, we asked (p. 49) that the judgment of the court below in Texaco be remanded with instructions "to dismiss for lack of venue." Despite these clear statements of the relief requested by the Commission, Texaco at no time prior to the present motion even suggested the possibility of transfer.

2. The new argument does not presently warrant consideration by this Court. The only decision in point is that in *Gulf Oil Corp., et al. v. Federal Power Commission* (C.A. 5, No. 21151), opinion denying rehearing issued April 15, 1964,² where the court (Circuit Judges Tuttle, Rives and Wisdom) concluded that it had no authority, in similar circumstances, to transfer a petition for review under the Natural Gas Act.³ In addition, the transfer issue would appear to

² On March 9, 1964, the Fifth Circuit had, by *per curiam* order, granted the Commission's motion to dismiss for lack of venue, thereby denying petitioners' request for transfer in the event venue was found to be improper. That order was lodged with this Court prior to the oral argument in this case.

³ The same question of a court of appeals' authority to transfer, after expiration of the statutory period for seek-

have little prospective importance in view of this Court's definitive interpretation of the venue provision.

3. Texaco does not claim that there is express statutory authority for a court of appeals to transfer a review proceeding to another court of appeals where the court in which the petition has been filed lacks venue. In *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, this Court recognized that there is no inherent extra-statutory power in a lower federal court which lacks venue to transfer a case to one in which venue might properly have been laid. Referring to 28 U.S.C. 1406(a), which makes express provision for transfer in such circumstances among district courts, the Court explained (p. 466) :

The problem which gave rise to the enactment of the section was that of avoiding the injustice which had often resulted to plaintiffs from dismissal of their actions merely because they had made an erroneous guess with regard to the existence of some elusive fact of the kind upon which venue provisions often turn. * * *

ing review, has also been raised in *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, C.A. 10, No. 7587, where Panhandle's claim to venue also rests on the erroneous view that for purposes of the Gas Act a corporation may be located some place other than in its state of incorporation.

Many earlier cases attest to the premise of *Goldlawr* that, in the absence of express statutory authority, a federal court without venue has no authority to transfer cases. See, e.g., *Schoen v. Mountain Producers Corp.*, 170 F. 2d 707, 713 (C.A. 3), certiorari denied, 336 U.S. 937; *Brown v. Heinen*, 61 F. Supp. 563 (D. Minn.) and cases cited; see also *MacNeil*

The attempt to invoke "inherent common law powers" of the courts (Texaco Motion, pp. 10-13)* ignores the restricted nature of the power of review here provided by Congress. This Court has characterized Section 313(b) of the Federal Power Act, 16 U.S.C. 825l(b), which corresponds to Section 19(b) of the Gas Act, as a "distinctive formulation of the conditions under which resort to the courts may be made," pointedly noting that "Congress determines the scope of jurisdiction of the lower federal

Bros. Co. v. Cohen, 264 F. 2d 186, 187 (C.A. 1); *Di Sabatino v. Mertz*, 82 F. Supp. 248, 249 (M.D. Pa.); 1 Moore's *Federal Practice* (2d Ed.), pp. 1902, 1904.

* Texaco's appeal to the "interests of justice" and its plea for "[f]airness, simple justice, and equity" comes belatedly from a party that deliberately chose to file its petition in the Tenth Circuit (a) after it had previously taken a number of other Commission orders to two other circuits for review (see the main brief of the Commission, p. 40, n. 39) and (b) after the Commission had previously made the same objection to venue in the Tenth Circuit with respect to two other Texaco petitions which were first filed in that Circuit (317 F. 2d 796, C.A. 10, Nos. 6947 and 7135).

In an apparent attempt to justify its taking this case to the Tenth Circuit, Texaco mistakenly asserts (Motion, p. 11, n. 4) that even if it had filed its petition for review in a different court it would have been "ripe for transfer" under 28 U.S.C. 2112 to the Tenth Circuit because of "Pan American Petroleum Corp.'s. petitions already there" (i.e., C.A. 10, Nos. 6973 and 7002, also disposed of by the same opinion below, 317 F. 2d 796). That Section of the Code, however, provides for transfer only where petitions seeking review of the *same* Commission order are filed in more than one circuit. Here Texaco and Pan American sought review of entirely different and separate orders. Moreover, Texaco's petition in No. 6947 below was filed over a month before any other petition in the entire group of cases relating to indefinite pricing clauses disposed of by the single opinion below.

*courts." Federal Power Commission v. Pacific Power & Light Co., 307 U.S. 156, 159.**

CONCLUSION

For these reasons Texaco's "motion" (which in substance seeks rehearing) should be denied and the judgment directed to the Tenth Circuit in accordance with the opinion of April 20, 1964.

Respectfully submitted.

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* The State cases and authorities relied upon by Texaco (Motion, pp. 7-9) support at most a proposition that the common law recognized the power of a court with *proper venue* to transfer a case, particularly if a fair and impartial trial could not be obtained in the transferor court. But, with perhaps one exception, the cases relied upon, while discussing this common law power, did not sanction transfers on the basis of any inherent power. Rather, the power at common law was discussed to help interpret the statutory or constitutional provision involved or to show that transfer authority existed because there had been an adoption of the common law.